

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of	) Docket No. 2020-0142
)
MAUI ELECTRIC COMPANY, LTD	) WEST MAUI PRESERVATION
	) ASSOCIATION'S MOTION TO
For Approval of Power Purchase Agreement	) INTERVENE OR, ALTERNATIVELY
for Renewable Dispatchable Generation with	) FOR PARTICIPANT STATUS, AND
Kahana Solar LLC	) REQUEST FOR CONTESTED CASE;
	) MEMORANDUM IN SUPPORT OF
	) MOTION; DECLARATION OF KAI
	) NISHIKI; AMENDED CERTIFICATE OF
_____	) SERVICE

**WEST MAUI PRESERVATION ASSOCIATION'S MOTION TO INTERVENE OR,
ALTERNATIVELY FOR PARTICIPANT STATUS, AND REQUEST FOR CONTESTED
CASE**

DECLARATION OF KAI NISHIKI

AMENDED CERTIFICATE OF SERVICE

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CASE**

Applicant WEST MAUI PRESERVATION ASSOCIATION, a non-profit organization, incorporated in the State of Hawai‘i (“WMPA”), by and through its undersigned counsel, hereby seeks to intervene in the above-captioned proceeding pursuant to the Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure, Hawaii Administrative Rules (“HAR”) § 16-601-55 (2019). In the alternative, and should this Commission deny intervenor status, WMPA seeks participant status pursuant to HAR §§16-601-56 and -57.

WMPA also requests that the Commission hold a contested case pursuant to Hawaii Revised Statutes (“HRS”) Chapter 91 on WMPA’s rights and interests, which would be affected by approval of the proposed power purchase agreement (“PPA”) between MAUI ELECTRIC COMPANY, LTD (“MECO”) and Kahana Solar, LLC, which is a wholly owned subsidiary of Innergex Renewable Energy, Inc..

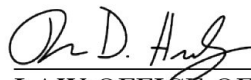
WMPA submits this motion for intervention, participation, and a contested case to ensure that WMPA and its officers and supporters’ rights and interests related to preserving, protecting and restoring the natural and cultural environment of West Maui, including its lands, coasts, and nearshore waters. WMPA further seeks to ensure that any proposed project will utilize sustainable energy production practices that will not harm the environment, and that community voices are considered and engaged adequately in Commission procedures on the proposed PPA. WMPA’s officers and supporters include adjacent and nearby neighbors, environmentalists, native Hawaiian practitioners, and others who live, work and play in the areas likely affected by

the proposed solar photovoltaic and energy storage project upon which the proposed PPA is based.

For these reasons, and the information provided in the enclosed memorandum and affidavits, WMPA respectfully requests to be admitted as an intervenor or, if such status is denied, as a participant to the proceedings, and also requests a contested case.

DATED: Honolulu, Hawai'i

October 5, 2020



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BEFORE THE PUBLIC UTILITIES COMMISSION
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In the Matter of) Docket No. 2020-0142
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MAUI ELECTRIC COMPANY, LTD) MEMORANDUM IN SUPPORT OF
) MOTION
For Approval of Power Purchase Agreement)
for Renewable Dispatchable Generation with)
<u>Kahana Solar LLC</u>)

MEMORANDUM IN SUPPORT OF MOTION

Applicant WEST MAUI PRESERVATION ASSOCIATION, a non-profit organization, incorporated in the State of Hawai'i ("WMPA"), by and through its undersigned counsel, respectfully seeks intervenor status, or if denied, be admitted as participants, in the above-captioned proceedings on Applicant MAUI ELECTRIC COMPANY, LTD's ("MECO") request for approval of a power purchase agreement ("PPA") for renewable dispatchable generation with Kahana, LLC¹ ("Kahana Solar"), filed with the Public Utilities Commission of the State of Hawai'i ("Commission") on September 15, 2020. WMPA also requests that the Commission hold a contested case pursuant to Hawaii Revised Statutes ("HRS") Chapter 91 on the rights and interests of the WMPA and its officers and supporters as described further herein.²

I. Introduction

On September 15, 2020 MECO filed its application seeking approval by "early 2021" of a certain PPA for Renewable Dispatchable Generation with Kahana Solar LLC ("MECO Application" or "Application"). WMPA seeks to become a party to proceedings on the PPA and to contribute information on the proposed 20-megawatt "photovoltaic project paired with energy storage" project ("Project") upon which the PPA is premised. Application at 1.

¹ Kahana Solar, LLC, which is a wholly owned subsidiary of Innergex Renewable Energy, Inc. ("Innergex").

² In any case, the instant proceedings on the MECO application constitute a contested case hearing on the rights and legal interests of the WMPA.

WMPA is a non-profit organization, incorporated in the State of Hawai'i and based in Lahaina on the island of Maui. Declaration of Kai Nishiki ("Nishiki Decl.") ¶3. WMPA is dedicated to preserving protecting and restoring the natural and cultural environment of West Maui, including activities that enhance the natural beauty, cultural heritage and public enjoyment of the West Maui region. *Id.* ¶4. WMPA's officers and supporters include MECO ratepayers who live, work and play in affected areas near and makai of the proposed Project. *Id.* ¶¶5-6. WMPA has been informed that the specific location and layout of the proposed Project has not been finalized and WMPA officers and supporters have concerns, rights, and interests that are properly raised as part of the decision-making process. *Id.* ¶7. WMPA is also concerned about price impacts of the PPA before the Commission on WMPA officers and supporters many of which are Maui resident ratepayers. *Id.* ¶11. WMPA and its officers and supporters are also concerned about the proposal to install an above-ground 69kV transmission line without identifying the specific location of the line or the potential environmental and traffic impacts of this line and its installation.³ *Id.* ¶12. WMPA and its officers and supporters have rights and interests that will be impacted by the proposed Project upon which the PPA is premised. *Id.* ¶7.

WMPA has been an effective advocate for West Maui communities in a range of formal public processes and judicial actions in which it was held to have standing.⁴ Nishiki Decl. ¶32.

³ The proposed installation of the 69 kV transmission line is governed under HRS § 269-27.6. MECO has not identified the specific location for the transmission line and therefore the Commission cannot rule on this aspect of the MECO Application. For instance, the line may be placed on State or County lands, which would trigger an HRS chapter 343 environmental review process that is meant to inform decisions, including the Commission's decision on the PPA.

⁴ WMPA was a party with standing in the following public interest actions: *County of Maui v. Hawai'i Wildlife Fund*, 590 U.S. (2020) (Lahaina nearshore water quality protection); *West Maui Pres. Ass'n v. Maui Planning Commission*, Civ. No. 07-1-0110 (Haw. 2d. Cir. Ct.); *West Maui Pres. Ass'n v. Colleen Suyama, Deputy Planning Director, et al*, SP No. 08-1-0003 (Haw. 2d. Cir. Ct.); *West Maui Pres. Ass'n v. Board of Variances and Appeals*, Civ. No. 11-1-0037 (Haw. 2d. Cir. Ct.); *Na Papa'i Wawae 'Ula'Ula v. DLNR*, Civ. 17-1-0483 (Haw. 2d. Cir. Ct.) (environmental review of Kā'anapali bay projects) and CAAP 19-00000268 (Haw. App.) (same); *Na Papa'i Wawae 'Ula'ula v. AOA Napili II*, Civ. No. 18-1-0028 (Haw. 2d. Cir. Ct.) (West Maui public shoreline access); *Na Papa'i Wawae 'Ula'ula v. AOA Hale Mahina*, Civ. No. 18-1-0029 (Haw. 2d. Cir. Ct.) (West Maui public shoreline access); *Na Papa'i Wawae 'Ula'ula v. AOA Hoyochi Nikko*, Civ. No. 18-1-0030 (Haw. 2d. Cir. Ct.) (West Maui public shoreline access); *Na Papa'i Wawae 'Ula'ula v. BLNR*, Civ. No. 18-1-0155 (challenging seawall construction in West Maui); *Na Papa'i Wawae 'Ula'ula v. AOA Hololani*, Civ. No. 18-1-0303 (same); *Na Papa'i Wawae 'Ula'ula v. AOA Kuleana*, Civ. No. 20-1-0008 (West Maui shoreline

For these reasons, amongst others discussed further *infra*, WMPA seeks to intervene or, in the alternative, to participate, in the instant proceedings.

II. All Nine Commission considerations weigh in favor of WMPA's intervention

As required by Hawaii Administrative Rule ("HAR") § 16-601-55(b) this motion and memorandum discuss:

- (1) The nature of the applicant's statutory or other right to participate in the hearing;
- (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
- (3) The effect of the pending order as to the applicant's interest;
- (4) The other means available whereby the applicant's interest may be protected;
- (5) The extent to which the applicant's interest will not be represented by existing parties;
- (6) The extent to which the applicant's participation can assist in the development of a sound record;
- (7) The extent to which the applicant's participation will broaden the issues orderly the proceeding;
- (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
- (9) Whether the applicant's position is in support of or in opposition to the relief sought.

A. WMPA has statutory and constitutional rights to a hearing due to its property and other interests in the project upon which the PPA is premised.

WMPA's right to intervene and participate in this proceeding is based on its protected interests in clean, sustainable, energy development on Maui that is appropriate for both the environment and the community. Some of these interests are described under HRS §269-92, which authorizes this Commission to establish standards for renewable energy resources and their development. *Id.* WMPA's officers and supporters have constitutionally protected property rights consequent to their ownership of and residence of nearby property and their status as utility ratepayers under article I, § 5 of the Hawai'i Constitution and the U.S. Constitution, amendments V and XIV. Nishiki Decl. ¶¶5-6. The proposed PPA approval is governed under HRS §269-16.22, which permits MECO to recover costs arising out of the PPA from its customers, including WMPA officers and supporters, through surcharges established by this Commission. *Id.* ¶5.

access); and WMPA was a party to a contested case under the State Department of Health concerning claims under the Safe Drinking Water Act, 42 U.S.C. § 300f et. seq, and the Clean Water Act, 33 U.S.C. §§1251 et. seq, in 2010-11.

WMPA's officers and supporters also have constitutional rights under article XI, §§ 1 and 9 as beneficiaries of Hawaii's public trust and based on their rights to a clean and healthful environment. WMPA's officers and supporters' rights to a clean and healthful environment are defined by provisions requiring consideration of greenhouse gas impacts under HRS §269-6(b)⁵ and of balancing technical, economic, environmental, and cultural considerations associated with modernization of the electric grid under HRS §§ 269-141 & -145.5. The Project upon which the PPA is premised constitutes advanced grid modernization and thus must consider environmental impacts. This consideration identifies HRS § 269-145.5 as a law relating to environmental quality within the meaning of article XI, § 9 of the Hawai'i Constitution.⁶ The Commission's

⁵ WMPA and its officers and supporters have interests in ensuring that greenhouse gas (GHG) emissions consequent to the project, even and especially as the project is being finalized, are appropriately assessed and minimized. Nishiki Decl. ¶20. Applicant's GHG analysis (exhibit "5" to MECO Application) is based on certain presumptions about transportation, siting, and operational practices that may change as the project design and siting is finalized.

⁶ Under HRS § 269-141, "Advanced grid modernization technology" is defined to mean: equipment, facilities, and associated processes that individually or collectively function to improve the reliability, resiliency, flexibility, and efficiency of the Hawaii electric system. Advanced grid modernization technology provides functional characteristics that improve the operational capability of the Hawaii electric system, including but not limited to automatic restoration of electrical service in response to power disturbance events, greater enabling of participation in utility customer programs, resilient operation against both physical and cyber-based attacks, the ability to satisfy power quality requirements of new technologies and end users, accommodation of energy generation and storage choices, enabling of innovative products and services in electricity markets, improving customer energy-efficiency practices encouraged by the availability of timely energy use information, and optimization of assets and improving the operational efficiency of the Hawaii electric system.

Id. The proposed project is comprised of a photovoltaic (PV) system and battery energy storage system, which will provide MECO with flexible, dispatchable renewable energy. "The Project's solar photovoltaic [] and storage components together will provide the Company with flexible, semi-dispatchable renewable energy. The Facility as a whole will provide grid services and energy to the Maui Electric system. In particular, the storage capability of the Facility will allow the Company to store solar energy generated by the Facility to be delivered during times of available demand. When grid charging is permitted, the Company will also be able to store energy from other resources on the grid to allow for greater certainty of supply for periods of lower solar production." MECO Application at 2-3. Proceedings on the PPA are therefore governed under HRS § 269-145.5, which governs the Commission's duty in regard to advanced grid modernization.⁶ HRS § 269-145.5(b) requires the Commission to:

exercises of authority under these laws relating to environmental quality implicate WMPA's officers and supporters' rights to a clean and healthy environment. Due process requires that the Commission hold a contested case prior to decision making on the PPA because the latter will impact the rights and interests of WMPA and its officers and supporters.

WMPA and its officers and supporters' rights and interests also merit due process protections, including a hearing, due to the MECO Application's reliance on invalid rules including a previous description of the Commission's inclinations and the Framework for Competitive Bidding. MECO Application at 3 n.4 ("The Commission's Inclinations on the Future of Hawaii's Electric Utilities . . . were appended as Exhibit A to Decision and Order No. 32052, filed April 28, 2014 in Docket No. 2012-0036."); MECO Exh. 2 at 4 (Framework for Competitive Bidding, Docket No. 03-0372, Decision and Order No. 23121 (December 8, 2006)). The Commission's Decision and Order No. 32052 and Framework for Competitive Bidding purported to set general policies that affect the procedure available to the general public and thus constituted a rule under HRS § 91-1(4).⁷ These were not properly promulgated under HRS § 91-3 procedures, which include public hearings.

balance technical, economic, environmental, and cultural considerations associated with modernization of the electric grid, based on principles that include but are not limited to:

- (1) Enabling a diverse portfolio of renewable energy resources;
- (2) Expanding options for customers to manage their energy use;
- (3) Maximizing interconnection of distributed generation to the State's electric grids on a cost-effective basis at non-discriminatory terms and at just and reasonable rates, while maintaining the reliability of the State's electric grids, and allowing such access and rates through applicable rules, orders, and tariffs as reviewed and approved by the commission;
- (4) Determining fair compensation for electric grid services and other benefits provided to customers and for electric grid services and other benefits provided by distributed generation customers and other non-utility service providers; and
- (5) Maintaining or enhancing grid reliability and safety through modernization of the State's electric grids.

⁷ HRS § 91-1(4) defines a "rule" to mean each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

B. WMPA's officers and supporters' property, financial, and other interests are extensively impacted by the proposed PPA approval.

WMPA officers and supporters include those living near and makai of the land proposed for the Project. Nishiki Decl. ¶6. As nearby property owners, WMPA's officers and supporters are also concerned about the impact the Project will have on their property values. WMPA and its agents and employees were not able to review Innergex's property value analysis, as it appears one was not done. Innergex does note that "some may not want the project 'in their backyard.' These sentiments may include whether property values of residential areas will be negatively affected." Application Exhibit 8 at 27. As a possible mitigation measure, Innergex states they "...will produce analyses that have been conducted in other locations [in] Hawaii that conclude this concern is unfounded." *Id.* Settled Hawai'i case law recognizes nearby and adjacent landowners hold a "concrete interest" in proceedings on proposed developments so as to satisfy standing requirements, including requirements for mandatory intervenor status. *See County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 419-20, 235 P.3d 1103, 1131 (2010) (recognizing adjoining landownership as a form of standing, but not a private right of action); *Mahuiki v. Planning Comm'n*, 65 Haw. 506, 654 P.2d 874 (1982) (affirming a decision to permit development nearby land in the special management area could only have an adverse impact on an adjacent landowner); *Town v. Land Use Comm'n*, 55 Haw. 538, 524 P.2d 84 (1974) (concluding adjacent and nearby property owners had a property interest in changing the land use entitlements and adjacent and nearby landowners have legal rights as a specific and interested party in a contested case proceeding to change land use designations or entitlements); *East Diamond Head Ass'n v. Zoning Bd. Appeals*, 52 Haw. 518, 479 P.2d 796 (1971) (adjoining property owner has standing to protect property from "threatening neighborhood change"); *Dalton v. City & County of Honolulu*, 51 Haw. 400, 462 P.2d 199 (1969) (property owners across the street from a proposed project have a concrete interest in scenic views, sense of space and density of population).

WMPA and its officers and supporters include MECO ratepayers who are concerned about the economic risks of the solar power plant associated with the PPA and the impact on

their rates.⁸ Nishiki Decl. ¶¶11, 24; *see supra* Part II.A. “A ratepayer who is compelled to pay higher utility rates by agency action is a person specially, personally and adversely affected. The fact that he shares this additional burden with all other users does not disentitle him from challenging the results.” *In re Hawaiian Electric Co.*, 56 Haw. 260, 264-64, 535 P.2d 1102, 1105 (1975). The Commission has previously recognized that MECO amongst other electric companies in Hawai‘i, are forecasting substantial rate increases and did not fully consider affordability. *Id.* ¶¶33; Exh. 07 at 34 (“Given the substantial increase in rates forecasted in the Report, the commission is concerned that the Companies have not fully considered the affordability of their plans[.]”). WMPA’s officers and supporters believes the economic risk posed by the solar power plant should not be borne by ratepayers, but rather by MECO and/ or other proponents of the project. Nishiki Decl. ¶24. WMPA and its agents and employees have reviewed MECO’s Application as well as related documents and believe the proposed solar project is NOT certain and specific enough to merit approval as part of a power purchase agreement.⁹ *Id.* ¶31.

C. The Commission’s approval of the PPA would have many and varied impacts on WMPA and its officers and supporters’ rights and interests

HAR §16-601-55(b)(3) requires discussion of the “effect of the pending order as to the applicant’s interest[.]” WMPA and its officers and supporters have interests in supporting appropriate energy projects in Maui generally and in environmental, recreational, aesthetic, and quality of life issues affecting communities living near or affected by to the Project and potential above-ground high voltage transmission line upon which the PPA is premised. Nishiki Decl. ¶¶4; 6; 12.

WMPA’s concerns were not adequately addressed during the public consultation that preceded MECO’s Application. Nishiki Decl. ¶7; For instance, WMPA and its officers and supporters have a significant interest ensuring the layout of the Project roads are designed to

⁸ MECO proposes a scheme of lump sum payment for net energy potential as opposed to energy delivered to “limit the developer's financial risk associated with excess energy curtailment...” MECO Application at 30. Yet, does not disclose whether and how that risk will then be assumed by ratepayers.

⁹ For example, the PPA describes an intention to obtain land rights for the project, but MECO’s application offers no reason that such rights could not have been obtained prior to execution of the PPA agreement or via an options contract. Nishiki Decl. ¶24.

prevent spoilage of near shore areas by, amongst other things, not being set in a straight mauka-makai direction. *Id.* ¶8.

Also, WMPA and its officers and supporters are concerned that the Project could disturb historic and cultural sites as they have an interest in the appropriate and respectful treatment, protection and preservation of such sites. *Id.* ¶16.

WMPA and its officers and supporters are further concerned about possible adverse impacts the Project will have on specific geographic areas that WMPA officers and supporters live, work and recreate in and around, including the adverse impacts of increased runoff to near shore areas. *Id.* ¶14. Furthermore, WMPA and its officers and supporters have concerns about the Project design and siting in relation to relative impacts on nearby gulches that are known to convey runoff and harbor native plants. *Id.* ¶20. WMPA officers and supporters swim, snorkel, beach walk, surf, paddle board, kayak, windsurf, and picnic at nearshore areas makai of the solar project, and are concerned about the increase in runoff from project to these ocean waters. *Id.* ¶15.

WMPA and its officers and supporters have specific knowledge of the geographic locations and surrounding communities that would be affected by the Project and would be able assist the Commission in its decisions relating to the proposed PPA. *Id.* ¶8 For example, WMPA and its officers and supporters are familiar with environmental and community impacts of the nearby Ku‘ia Solar project located near Lahainaluna High School, which impacts on West Maui areas can inform the Commission’s decision on the application. WMPA is concerned that there is no vegetation under the Ku‘ia Solar project solar panels and the project contributes to runoff. *Id.* ¶29.

WMPA and its officers and supporters have an interest in ensuring that the Project does not have unreasonably adverse visual impacts on makai to mauka views. *Id.* ¶27.

WMPA and its officers and supporters have concerns relating to the possibility of safety hazards to its officers and supporters caused by the proximity of the Project to the Kapalua airport. *Id.* ¶10.

WMPA and its officers and supporters seek to ensure that the proposed Project does not harm endangered and threatened species or their critical habitat including the protection of native and listed flora and fauna of Honokōwai and that appropriate mitigation measures are included in the development of the Project. *Id.* ¶18.

WMPA and its officers and supporters' interests extend to vegetation management relating to the Project. The Project developer, Innergex, utilize ungulates and various pesticides to manage onsite vegetation at its Paeahu Solar project in Kihei, Maui, these practices, may impact native plant life and contribute to runoff and pollution of West Maui public trust resources. *Id.* ¶23. WMPA and its officers and supporters have interests in ensuring the Project's vegetation management plan will not adversely impact West Maui natural resources and the traditional and customary practices that rely on those resources. *Id.* ¶26.

WMPA and its officers and supporters have an interest in ensuring property rights and other approvals are timely and appropriately obtained to help ensure the Project is not mired in lengthy and costly disputes. *Id.* ¶19. WMPA and its officers and supporters also have an interest in ensuring that the project is properly decommissioned and disposed of at the end of its useful life. *Id.* ¶22.

WMPA and its officers and supporters have significant interest in ensuring any community benefits associated with the Project are allocated in ways that meaningfully benefit West Maui communities. *Id.* ¶19.

D. Other means by which WMPA's interests may be protected are insufficient

This Commission may consider the inadequacy of other means by which WMPA and its officers and supporters can protect their property rights, environmental, quality of life, organizational missions, health, and financial interests in ensuring that the PPA is premised on an appropriate energy project. HAR §16-601-55(b)(4). MECO represents that a Maui County Special Use Permit will be sought at a future date. Application Exh. 8 at 25. First, the County permit process is inadequate to the WMPA's interests because it would not squarely address the many issues, which are part of the WMPA's mission.¹⁰ Furthermore, the County process would not address WMPA's officer and supporters' property interests as ratepayers. Nishiki Decl. ¶¶5; 11; 24.

¹⁰ The County special use permit criteria consider the proposed use's consistency with the community plan uses and maps, the intent and purpose of the agricultural district, the infrastructural capacities of the area, and state agricultural district guidelines; avoid adverse impacts on the social, cultural, economic, environmental, and ecological character and quality of the area, ensure protections against deleterious effects, and whether the need for public services created by the project will be fulfilled. Maui County Code § 19.510.070(B)(1)-(8).

Second, merely deferring to the County's process would expose WMPA and its officers and supporters' rights and interests to the risks of bureaucratic momentum. This Commission's decision-making matters because following decisionmakers may inadvertently rely on its actions. "Bureaucratic rationalization and bureaucratic momentum are real dangers, to be anticipated and avoided by [agencies]." *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) quoted by *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010). The accumulated review and approvals from successive agencies for a project may have a compound effect that prejudices WMPA's rights and interests. The County Planning Commission may seek to avoid changing or disapproving the solar power plant if it first obtains this Commission's approval.

E. No existing parties can adequately represent the WMPA's interests.

This Commission may consider that no existing parties will represent WMPA and its officer and supporters' interests. HAR §16-601-55(b)(5). MECO, the Commission staff, and the Consumer Advocate cannot adequately represent WMPA and its officers and supporters' interests. See *Hoopai v. Civil Service Comm'n*, 106 Hawai'i 205, 217, 103 P.3d 365, 377 (2004) ("[Proposed intervenors] need only show that the Commission's representation of [its] interests may have been inadequate"). A "lack of adequate representation" also exists where a prospective intervenor would make a "more vigorous presentation" of a side of an argument than the government defendant because the regulation – the validity of which is being challenged – would benefit members of the prospective intervenor group. *New York Public Interest Res. Grp. v. Regents of Univ. of New York*, 516 F.2d 350, 352 (2d Cir. 1975). WMPA would make a more vigorous presentation of its officers and supporters' interests and positions than any existing party.

The Consumer Advocate's responsibilities are to members of the public insofar as they are consumers of a utility and do not extend to WMPA and its officers and supporters' quality of life, financial harms, and environmental concerns. HRS §§ 269-51; -54(b)(7) (the Consumer Advocate's authority is restricted to representing interests of *consumers of utility services* and not as adjacent neighbors or environmentalists). Additionally, the Consumer Advocate lacks the same organizational focus as WMPA and does not have on-the-ground knowledge of the Project site and surrounding community.

F. WMPA's participation will assist the Commission's decision-making

This Commission may consider the WMPA's ability to assist in the development of a sound record by intervening or participating in these proceedings. HAR §16-601-55(b)(6). For example, the MECO Application contains hundreds of pages describing community outreach efforts. WMPA's officers and supporters are largely composed of target community members who can assist the Commission in establishing a more comprehensive picture of the impacts of PPA approval on this community by providing further information on technical, economic, environmental, and cultural considerations that are pertinent to the MECO Application. Nishiki Decl. ¶¶30. Furthermore, WMPA itself is dedicated to preserving, protecting, and restoring the natural and cultural environment of West Maui, the very area most impacted by the proposed Project. *Id.* ¶¶23-25.

G. WMPA's intervention or participation will not broaden issues or delay proceedings

1. *Granting intervention or participation to WMPA will not broaden issues.*

WMPA's intervention or participation would not broaden issues or delay proceedings as is properly considered here under HAR §16-601-55(b)(7). WMPA's mission is dedicated to preserving, protecting and restoring the natural and cultural environment of West Maui, all of which could be greatly affected by the proposed Project which is the subject of these proceedings. Nishiki Decl. ¶4. WMPA's interests also align with those issues that the Commission is already required to consider as part of these proceedings, including the impacts of the solar power plant, PPA, and transmission lines on rates, greenhouse gas production, and economic, environmental, and cultural considerations associated with modernization of the electric grid under HRS §§ 269-6(b), -141 & -145.5.

2. *WMPA's intervention or participation will not unduly delay proceedings.*¹¹

Inclusion of WMPA would not unduly delay proceedings. The standard is not one under which any potential delay weighs against granting intervention. "Additional parties always take additional time which may result in delay, but this does not mean that intervention should be denied." 7C Wright, Miller & Kane. *Federal Prac. & Procedure*, Civil 2d. 1913 at 381-82 (2d

¹¹ WMPA notes MECO seeks approval from this Commission by "early 2021" MECO Application at 1. However, MECO also submitted a proposed approval for a 69 kV above-ground transmission line, which will likely require further time to review and could possibly include a public hearing. Any calculation as to the timely disposition of the MECO Application should not require an approval date of "early 2021."

ed. 1986). Rather, judicial bodies may consider intervention improper only where it “will ‘unduly delay’ the adjudication.” *Id.*; see also *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 265 F.2d 364, 367 n.1 (D.C. Cir. 1959) (“Efficient and expeditious hearing should be achieved not by excluding parties who have a right to participate, but by controlling the proceedings so that all participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence”). WMPA’s interests are all pertinent to this proceeding and its intervention or participation would not inject collateral, new issues, wholly unrelated to the underlying litigation. See *Blackfeld Hawaii Corp. v. Travelodge Int’l, Inc.*, 3 Haw. App. 61, 641 P.2d 981 (1983); *Taylor Comm. Grp v. Southwestern Bell Tel. Co.*, 172 F.3d 385, 389 (5th Cir. 1999); *United States v. S. Florida Water Management Dist.*, 922 F.2d 704, 711-712 (11th Cir. 1991).

Additionally, WMPA is represented by counsel and this arrangement would serve to increase the efficiency and timeliness of the WMPA’s intervention or participation and thus not cause undue delay in the proceedings.

H. The WMPA’s interests are distinguishable from those of the general public

The Commission may properly consider WMPA’s interests which are distinguishable from those of the general public. HAR §16-601-55(b)(8). As indicated *supra* Part II.A and B, many of the WMPA’s officers and supporters live and/ or recreate near and around to the location proposed for Project and therefore have interests distinguishable from the general public.

WMPA and its officers and supporters’ rights and interests in a clean and healthy environment, recreational, aesthetic, and wildlife resources may be so directly and immediately affected by the Project that WMPA and its officers and supporters hold interests clearly distinguishable from that of the general public. Compare *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Comm’n*, 903 P.2d 1246, 1250, 79 Hawai‘i 425, 429 (1995) (*PASH II*) (concluding an unincorporated public interest membership organization had standing to contest a county permitting decision); *Life of the Land v. Land Use Comm’n*, 63 Haw. 166, 623 P.2d 431 (1981) (nonprofit group was neither an owner nor an adjoining landowner, but was held to have personal and special aesthetic and environmental interests); *Citizens for the Protection of the North Kohala Coastline v. County of Hawaii*, 91 Hawai‘i 94, 101, 979 P.2d 1120, 1127 (1999) (community group alleging recreational and other interests demonstrated standing).

Potential harms to these interests constitute an injury in fact to the interests of WMPA and its officers and supporters, which establishes standing to intervene. *Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 321-22, 167 P.3d 292, 314-15 (2007) (showing of an injury in fact to recreational interests of its members would suffice to establish standing to intervene); *Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982) (an injury to a recreational interest is an injury in fact sufficient to constitute standing to assert the rights of the public for purposes of declaratory and injunctive relief) *as interpreted by* *Citizens v. County of Hawai'i*, 91 Hawai'i 94, 101, 979 P.2d 1120, 1127 (1999) (citizen group had standing to challenge agency's issuance of a permit for coastline resort construction where "injury to its members' quality of life is threatened").

Granting intervention to WMPA accords with liberalized standing requirements for environmental and cultural practitioners. In cases where environmental and traditional and customary practitioners interests are at stake, Hawai'i courts "have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements." *Citizens for the Protection of the North Kohala Coastline*, 91 Hawai'i at 101, 979 P.2d at 1127 (citations omitted). "[O]ur basic position has been that standing requirements should not be barriers to justice." *Life of the Land*, 63 Haw. at 174, 623 P.2d at 441. Liberalized standing particularly makes sense in the context of intervention, which provides for nonparties to "represent their interests and arguably improves the court's decision making by allowing the presentation of different viewpoints and evidence." Juliet J. Karastelev, *On the Outside Seeking In: Must Intervenor Demonstrate Standing to Join a Lawsuit?*, 52 Duke L. J. 455 (2002). Including intervenors benefits judicial economy because their inclusion may spare parties from relitigation of the same issue. See Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 Mich. J. Race & L. 263, 279-80 (1999) (disposition of issues in a single lawsuit may be achieved through liberal intervention and may avoid subsequent lawsuits).

III. WMPA does not support the MECO Application.

WMPA currently does not support the MECO Application. Based on the concerns listed *supra*, WMPA believes the current Application is not certain and specific enough to merit approval at this time. Nishiki Decl. ¶31. However, given sufficient information and the proper controls and conditions, WMPA could support the project if it addressed the significant

community concerns that currently exist. *Id.* For these reasons and at this time, WMPA seeks to intervene or participate in the instant proceedings in order to assist the Commission in achieving a decision that best complies with the rights of all interested communities and relevant laws. HAR §16-601-55(b)(9).

IV. Request for a Contested Case

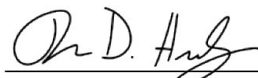
WMPA seeks a contested case on the proposed PPA's impact on WMPA and its officers and supporters' rights and interests. A contested case is a "proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HRS § 91-1(5). Ongoing proceedings on the MECO Application will constitute a contested case on the legal rights and interests of WMPA and its officers and supporters. However, WMPA expressly requests a contested case to avoid later confusion as to whether WMPA expected its legal rights and interests to also be adjudicated as part of the proceedings on the MECO Application.

V. Conclusion

Based on the foregoing, WMPA respectfully requests that this Commission grant WMPA's request for intervention, or in the alternative, participation, and for a contested case on the MECO Application for approval of the PPA, filed September 15, 2020.

DATED: Honolulu, Hawai'i

October 5, 2020



LAW OFFICE OF RYAN D. HURLEY

RYAN D. HURLEY

LAW OFFICE OF BIANCA ISAKI

BIANCA ISAKI

Attorneys for West Maui Preservation Association

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of	) Docket No. 2020-0142
)
MAUI ELECTRIC COMPANY, LIMITED	) DECLARATION OF KAI NISHIKI
)
For Approval of Power Purchase Agreement)
for Renewable Dispatchable Generation with)
<u>Kahana Solar, LLC</u>)

DECLARATION OF KAI NISHIKI

I, KAI NISHIKI, do declare under penalty of law that the following is true and correct.

1. I am a resident of the island and county of Maui.
2. I currently reside in Kahakuloa, Maui and previously lived in Honokōwai, Maui.
3. I am the vice-president of Petitioner WEST MAUI PRESERVATION ASSOCIATION, a Hawai'i nonprofit corporation with its primary place of business in Lahaina, Maui (WMPA).
4. WMPA is dedicated to preserving, protecting, and restoring the natural and cultural environment of West Maui, its lands, coasts, and its nearshore waters. WMPA conducts conservation and restoration actions and educational activities for the betterment, preservation, maintenance, and protection of West Maui, thereby enhancing the natural beauty, cultural heritage, and public enjoyment of the West Maui region.
5. WMPA officers and supporters include ratepayers to Applicant MAUI ELECTRIC COMPANY, LIMITED (MECO).
6. WMPA officers and supporters who live, work, and recreate in areas near and makai of MECO's proposed Kahana Solar, LLC project on 220 acres in Honokōwai, Maui, on Tax Map Key No. (2) 4-3-001:017.
7. We are informed that the specific location and layout of the project have not yet been finalized and therefore we cannot be assured WMPA and other community interests were addressed as part of the public consultation process. WMPA has concerns, rights, and interests that are properly raised as part of the decision-making process.
8. WMPA and its officers and supporters have interests in ensuring the layout of the

roads, which may facilitate runoff to makai areas, are designed to prevent spoilage of nearshore areas by, amongst other things, not being set in a straight mauka-makai direction.

9. WMPA and its officers and supporters have interests in the proposed project's impact on its specific geographic area, which are areas in which WMPA officers and supporters live, work, and recreate in WMPA officers and supporters use nearshore areas makai of the project area that could be adversely impacted by increases in runoff.

10. WMPA and its officers and supporters have interests in ensuring safety hazards to its officers and supporters caused by the proximity of solar panels to the Kapalua airport and the flight path of airplanes are prevented and fully considered.

11. WMPA and its officers and supporters have interests in the price impacts of the power purchase agreement (PPA) before the Commission on Maui resident ratepayers, which include WMPA officers and supporters.

12. WMPA and its officers and supporters are also concerned about the proposal to install an above-ground 69kV transmission line without identifying the specific location of the line or the potential environmental and traffic impacts of this line and its installation.

13. As proposed, the project will be sited adjacent to the non-perennial Mahinahina gulch stream at its southern border, the perennial Kahanaiki and Pulepule gulch streams along the middle of the project area, and the perennial Kahana stream would be the north boundary. The Honokōhau ditch traverses the project area.

14. WMPA and its officers and supporters have interests in preventing increased runoff to these gulch streams and increased pollution from the project entering these sensitive areas and waterways.

15. WMPA officers and supporters swim, snorkel, beach walk, surf, paddle board, kayak, windsurf, and picnic at nearshore areas makai of the solar project, and are concerned about the increase in runoff from project to these ocean waters.

16. WMPA and its officers and supporters have interests in the appropriate and respectful treatment, protection, and preservation of historic properties that may be affected by the proposed project and that appropriate mitigations are included in project conditions.

17. WMPA and its officers and supporters have interests in ensuring that community benefits are allocated in ways that benefit West Maui communities.

18. WMPA and its officers and supporters have interests in ensuring the project does

not harm native and listed flora and fauna of Honokōwai and that appropriate mitigations are included in project conditions.

19. WMPA and its officers and supporters have interests in ensuring that land rights and other requirements are timely and appropriately obtained such that the proposed project is not mired in lengthy and expensive disputes that prevent realization of any material project benefits.

20. WMPA and its officers and supporters have interests and concerns about project design, siting, and consequent impacts because it is located close to gulches known to convey runoff and to harbor native plants.

21. WMPA and its officers and supporters have interests in ensuring that greenhouse gas (GHG) emissions consequent to the project, even and especially as the project is being finalized, are appropriately assessed and minimized.

22. WMPA and its officers and supporters have interests in ensuring the proper decommissioning and disposal of the project at the end of its life.

23. WMPA and its officers and supporters understand the Kahana Solar, LLC developer, Innergex Renewable Energy, Inc. (Innergex) has proposed to use ungulates and various pesticides to manage vegetation in its Paeanu Solar LLC project in Kīhei, Maui. Use of ungulates and pesticides may impact native plant life and contribute to runoff and pollution of West Maui public trust resources.

24. WMPA and its officers and supporters have interests in ensuring the economic risk posed by the solar power plant should not be borne by ratepayers, but rather by MECO and/or other proponents of the project.

25. The proposed power purchase agreement describes an intention to obtain land rights for the project, but MECO's application offers no reason that such rights could not have been obtained prior to execution of the PPA agreement or via an options contract.

26. WMPA and its officers and supporters have interests in ensuring vegetation plans for the project will not adversely impact West Maui natural resources and traditional and customary practices that rely on those resources.

27. WMPA and its officers and supporters have interests in ensuring the project does not have unreasonably adverse visual impacts on makai to mauka views.

28. WMPA and its officers and supporters have knowledge of the geographic location

and surrounding communities that would assist the Commission in its decision on the proposed PPA.

29. WMPA and its officers and supporters are familiar with environmental and community impacts of the nearby Ku‘ia Solar project located near Lahainaluna High School, which impacts on West Maui areas can inform the Commission’s decision on the application. For instance, there is no vegetation under the Ku‘ia Solar project solar panels and the project contributes to runoff.

30. WMPA’s officers and supporters are largely composed of target community members who can assist the Commission in establishing a more comprehensive picture of the impacts of PPA approval on this community by providing further information on technical, economic, environmental, and cultural considerations that are pertinent to the MECO Application

31. WMPA and its agents and employees reviewed MECO’s application, Innergex’s community outreach plan, and public consultation documents and other information and believes the proposed solar project is not certain and specific enough to merit approval as part of a power purchase agreement. However, given sufficient information and the proper controls and conditions, WMPA could support the project if it addressed the significant community concerns that currently exist.

32. WMPA has been an effective advocate for West Maui communities in a range of formal public processes and judicial actions in which it was held to have standing in the following public interest actions: *County of Maui v. Hawa’i Wildlife Fund*, 590 U.S. ____ (2020) (Lahaina nearshore water quality protection); *West Maui Pres. Ass’n v. Maui Planning Commission*, Civ. No. 07-1-0110 (Haw. 2d. Cir. Ct.); *West Maui Pres. Ass’n v. Colleen Suyama, Deputy Planning Director, et al*, SP No. 08-1-0003 (Haw. 2d. Cir. Ct.); *West Maui Pres. Ass’n v. Board of Variances and Appeals*, Civ No. 11-1-0037 (Haw. 2d. Cir. Ct.); *Na Papa’i Wawae ‘Ula’Ula v. DLNR*, Civ. 17-1-0483 (Haw. 2d. Cir. Ct.) (environmental review of Kā‘anapali bay projects) and CAAP 19-00000268 (Haw. App.) (same); *Na Papa’i Wawae ‘Ula’ula v. AOA Napili II*, Civ. No. 18-1-0028 (Haw. 2d. Cir. Ct.) (West Maui public shoreline access); *Na Papa’i Wawae ‘Ula’ula v. AOA Hale Mahina*, Civ No 18-1-0029 (Haw. 2d. Cir. Ct.) (West Maui public shoreline access); *Na Papa’i Wawae ‘Ula’ula v. AOA Hoyochi Nikko*, Civ No. 18-1-0030 (Haw. 2d. Cir. Ct.) (West Maui public shoreline access); *Na Papa’i Wawae ‘Ula’ula v. BLNR*,

Civ. No. 18-1-0155 (challenging seawall construction in West Maui); *Na Papa'i Wawae 'Ula'ula v. AOAOL Hololani*, Civ No. 18-1-0303 (same); *Na Papa'i Wawae 'Ula'ula v. AOAOL Kuleana*, Civ No. 20-1-0008 (West Maui shoreline access); and WMPA was a party to a contested case under the State Department of Health concerning claims under the Safe Drinking Water Act, 42 U.S.C. § 300f et. seq, and the Clean Water Act, 33 U.S.C. §§1251 et. seq, in 2010-11.

33. WMPA and its officers and supporters are interested in the Commission proceedings because MECO amongst other electric companies in Hawai'i may be forecasting substantial rate increases and not fully considering affordability.

DECLARANT FURTHER SAYETH NAUGHT

DATED: Lahaina, Maui

September 22 2020

A handwritten signature in black ink, appearing to read "Kai Nishiki", written over a horizontal line.

KAI NISHIKI
Declarant

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of	) Docket No. 2020-0142
)
MAUI ELECTRIC COMPANY, LTD	) CERTIFICATE OF SERVICE
)
For Approval of Power Purchase Agreement)
for Renewable Dispatchable Generation with)
<u>Kahana Solar LLC</u>)

AMENDED CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was duly served on the following parties, at the following email addresses pursuant to the Commission's Order No. 37043, entered March 13, 2020:

KEVIN M. KATSURA
Director, Regulatory Non-Rate Proceedings
HAWAIIAN ELECTRIC COMPANY, INC.
P.O. Box 2750
Honolulu, Hawai'i 96840-0001
kevin.katsura@hawaiianelectric.com

Attorney for MAUI ELETRIC COMPANY, LIMITED

DEAN NISHINA
DIVISION OF CONSUMER ADVOCACY
Department of Commerce & Consumer Affairs
335 Merchant Street, Room 326
Honolulu, Hawai'i 96813
dnishina@dcca.hawaii.gov

DATED: Honolulu, Hawai'i

October 5, 2020



LAW OFFICE OF RYAN D. HURLEY
RYAN D. HURLEY
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI
Attorneys for West Maui Preservation Association

THE HAWAII PUBLIC UTILITIES COMMISSION ACKNOWLEDGES RECEIPT OF YOUR SUBMITTAL.

Form:	Hawaii PUC eFile Docketed
Entity:	WEST MAUI PRESERVATION ASSOCIATION
Confirmation Number:	BIAN20125757908
Date and Time Received:	Oct 5 2020 12:57 PM
Date Filed:	Oct 5 2020

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